NAEB

PRESIDENT'S MEMO

NATIONAL ASSOCIATION OF EDUCATIONAL BROADCASTERS

1346 Connecticut Avenue, N.W. Washington 6, D. C. Phone North 7-6000

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COPYRIGHT LAW DEVELOPMENTS

This is the third report on copyright developments affecting educational broadcasting. Because there is much to cover, it seems advisable to organize this review largely in outline form.

I. RECENT HISTORY ON COPYRIGHT REVISION FROM EDUCATION'S VIEWPOINT

1955 - Congress authorizes the Copyright Office to revise the 1909 Copyright Law.
1961 - The Register of Copyrights submits tentative recommendations for revision.
1962 - NEA calls national conference on problems for teachers in connection with technological changes in education including copyright problems.
1963 - Conference of 47 educational organizations is held in Washington to plan steps education should take regarding proposed revisions in copyright law.
January 18, 1964 - statement on behalf of education endorsed by 25 educational organizations is presented at a Copyright Panel, one of a series of meetings held by the Register to obtain comments on his preliminary draft.
March 18, 1964 - Ad Hoc Committee meets in New York with the Committee on Copyright Issues of the ALA and the Joint Libraries Committee.
May 15, 1964 - Ad Hoc Committee meets with representatives of the Music Publishers Council.
June 11, 1964 - Ad Hoc Committee presents proposed educational exemption to Register of Copyrights.
July 20,1964 - Identical bills are introduced in the House and Senate on behalf of the Register of Copyrights.
July 22, 1964 - Ad Hoc Committee meets to consider Bills and prepare strategy for August meeting in New York.

August 4, 1964 - American Bar Association meeting in New York holds a major session on Copyright. Attorney Rosenfield, representing Ad Hoc Committee, upholds education's position.
August 5, 1964 - Ad Hoc Committee holds press conference in New York City indicating proposed bills are intolerable and that unless substantial revisions are made, the Ad Hoc group prefers the present law and will oppose the proposed law. Statements are presented by Dean Fred Siebert, Chr. NAEB Rights Committee and by President Harley, in behalf of educational broadcasters.
August 6, 1964 - Register of Copyrights holds a panel of consultants in New York City to obtain reaction to the Bills. Statements of objection are made by Rosenfield, Alleinikoff, and Harley.
September 2, 1964 - Ad Hoc Committee lawyers draft possible revisions of Committee's proposed amendment.
September 14, 1964 - Ad Hoc Committee considers alternative positions proposed by lawyers, decides to adhere to its proposed amendment as previously modified.
September 15, 1964 - Ad Hoc Committee holds meeting with textbook publishers group.
September 22, 1964 - Representatives from Ad Hoc Committee have private conference with the Register to impress upon him and his staff education's goals and needs in respect to copyright revision.

The above represents the barest outline of activities reflecting education's interest in the Copyright situation. It does not include the numerous speeches, panel discussions, and conferences in which the NAEB has participated, nor the almost weekly work sessions of the Ad Hoc Committee which have been held during the past few months.

II. SIGNIFICANCE OF INTRODUCTION OF BILLS FOR COPYRIGHT REVISION

At the request of Abraham Kaminstein, Register of Copyrights, identical bills proposing revision of the Copyright Law of 1909 were introduced (July 20) by Representative Emanuel Celler (D-N.Y.) and Senator John L. McClellan (D.-Ark.), Chairmen respectively of the House Judiciary Committee and the Subcommittee on Patents, Trademarks and Copyright of the Senate Judiciary Committee.

These bills were introduced for purposes of study and comment; no committee hearings will be held on them during the present session of Congress. (1) Nevertheless, these bills represent the outcome of nine years' study by the Register and thus reflect Mr. Kaminstein's present thinking; consequently, except for possible modifications, they indicate what is likely to be contained in the bills (hereafter referred to as the Bill) to be introduced at the next session of Congress. This "draft Bill", therefore, merits most serious attention. It has far-reaching implications for educational broadcasters both as users and producers of copyrighted materials.

(1) Copies of these bills (HR11947, S.3008) may be obtained by writing the Committees or your Congressman.

III. SECTIONS OF THE BILL OF PARTICULAR CONCERN TO EDUCATIONAL BROADCASTING

A. Section 1. Subject matter of copyright; in general.

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include, but are not limited to, the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) choreographic works and pantomimes; (5) pictorial, graphic, and sculptural works; (6) motion pictures; (7) sound recordings.

B. Section 5. Exclusive rights in copyrighted works.

(a) General scope of copyright. -- Subject to sections 6 through 13, the owner of copyright under this title has the exclusive rights to do or to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures, to perform the copyrighted work publicly;

(5) in the case of pictorial, graphic, or sculptural works, to exhibit the copyrighted work publicly.

(b) Definitions of certain exclusive rights. --

(1) To "perform" a work means to recite, render, play, act, or represent it, either directly or by means of any device or process, or in the case of a motion picture, to show its images or to make the sounds accompanying it audible.

(2) To "exhibit" a work means to show a copy of it, either directly or by means of motion picture films, slides, or any other device or process.

(3) To perform or exhibit a work "publicly" means:

(A) to perform or exhibit it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered;

(B) to broadcast a performance or exhibition of the work to the public, or to transmit to the public a broadcast of any performance or exhibition otherwise than as a common carrier;

(C) to communicate a performance or exhibition of the work to the public by means of any device or process.

C. Section 6. Limitations on exclusive rights: fair use.

Notwithstanding the provisions of section 5, the fair use of a copyrighted work to the extent reasonable, necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include:

(1) the purpose and character of the use;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

D. Section 8. Limitations on exclusive rights: exemption of certain performances and exhibitions.

Notwithstanding the provision of section 5, the performance of a nondramatic literary or musical work, or the exhibition of a pictorial, graphic, or sculptural work, is not an infringement of copyright in any of the following cases:

(1) performance or exhibition of the work by instructors or pupils in the course of face-to-face teaching activities;
(2) performance or exhibition of the work by or in the course of a broadcast or other transmission made for reception solely within nonprofit educational institutions;
(3) performance or exhibition of the work in the course of services at a place of worship or other religious assembly;

(4) performance of the work, otherwise than in a broadcast to the public, without any purpose of direct or indirect commercial advantage and without payment of any salary, fee, or other compensation to the performers, if:

(A) there is no direct or indirect admission charge, or
(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain.

Other relevant sections of the proposed revision would: (1) expand the duration of the copyright from the present 28 years, renewable for another 28 years, to the life of the author plus 50 years; (2) permit the Register of Copyrights to exempt any categories of material from the requirement that two copies be deposited in the Copyright Office for the use of the Library of Congress or permit him to require the deposit of only one copy or phonorecord; (3) provide for mandatory statutory damages for even innocent infringers.

IV. ANALYSIS OF PROPOSED BILL AS IT RELATES TO EDUCATIONAL BROADCASTING

A. Sections 5, 8

These sections deprive educational broadcasters (using radio and television, open and/or closed circuit) of rights enjoyed for a long time under the "for profit" clause - the right to perform copyrighted historical, poetical, literary material of a non-dramatic nature, and also musical material so long as such material is not dramatized and is not performed "for profit." These sections remove the "for profit" protection from the law, and in the broad view, substitute nothing really beneficial in its place. Specifically, these sections would:

1. Prevent exempted use for open-circuit (radio and TV) broadcasting of any copyrighted material, i.e., books, articles, stories, music, graphs, maps, charts, paintings, photographs and other pictorial material by:

   a. Imposing prior clearance or royalty payments for all copyrighted material used in broadcasting.
   b. Obliging educational radio and TV stations who produce a high proportion of their own programming and who are therefore specially dependent upon free and immediate access to a vast variety of support materials from which to custom-build programs covering a wide range of subject matter to suffer delays inherent in clearance procedures.

c. Requiring the addition of extensive staffs to handle complex clearance procedures, bookkeeping, and ownership searches.

d. Imposing the burden of royalty payments upon modest budgets.

e. Obliging educational broadcasters through these impositions largely to retreat to the use of "homemade" materials or to those in the public domain (outdated and often inappropriate), simply because they could be used without the burden of cost or clearance.

2. Separate educational broadcasting from education, because the Bill:

a. Fails to recognize that education is education (whether it is disseminated in printing, by wire, or by air waves) and that educational broadcasting is an integral and inseparable part of the educational process.

b. Fails to recognize that there is a distinction between non-profit, non-commercial, educational broadcasting and entertainment-oriented, profit-making, commercial broadcasting.

3. Distinguish between exempted and non-exempted educational applications of modern transmission techniques on the basis of how the content is distributed (open or closed circuit) and on the basis of where the recipient is located (within non-profit educational institutions or in home, dormitory, factory, or hospital), thereby effecting a discrimination which:

a. Limits heretofore "free use" of copyrighted materials by educational broadcasters to closed-circuit transmission (by cable or microwave).

b. Severely handicaps service to schools, since the majority of instruction for elementary and secondary schools is provided via broadcasting.

c. Severely diminishes educational opportunities via broadcasting for those outside of school walls:

(1) Students unable to attend or take residence on campus,

(2) Adults interested in continuing their education by going to school at home via credit or non-credit courses,

(3) Psychologically and physically handicapped,

(4) Illiterates eager to learn to read and write in privacy of their homes but who are unwilling to attend school,

(5) Professional people in need of in-service training or refresher courses,
(6) Workers in need of vocational instruction or re-training,
(7) Pre-school children who need to be prepared for their first formal school experience,
(8) Children in need of wholesome after-school program fare, and
(9) Parents interested in tuning in on school broadcasts to observe what and how their children are being taught.

4. Bars educational broadcasters from making a single copy of an entire work or multiple copies of an excerpt or quotation from a work, for instructional purposes, a prohibition which largely:

a. Prevents recording or pre-recording of programs for delayed broadcast purposes (on open or closed circuit).
b. Denies to broadcasters the benefits of using recording in order to utilize talent at the time it is available and to make more efficient use of staff and facilities in scheduling productions.
c. Precludes maximum use of instructional programs by preventing schools from recording programs received on the air or from pre-recording their own programs for delayed internal transmission to fit varied bell schedules.
d. Prevents stations from serving schools effectively via repeat transmissions for accommodation of varied schedules.
e. Destroys the economic benefits which ETV can provide through development and exchange of high quality courses pre-recorded on video tape for repeated use over several years' time.
f. Prevents the preservation of outstanding programs for rebroadcast, study or archival purposes.
g. Requires tailoring of broadcast schedules to the availability of program participants rather than the needs of students.

B. Section 6 (Fair Use)

Substitutes for the present unwritten, judicially instituted and interpreted doctrine of "fair use", a written definition which may be narrower and more limiting to education than the present application of "fair use." This proposed section:

1. Gives no assurance to an educational broadcaster as to when he can use copyrighted materials or how much can be used with impunity; consequently, unless he consults a lawyer before preparing a broadcast, he risks a law suit. (Good intentions or ignorance are no excuse under statutory damage provisions.)
2. Places the burden of proof upon the one claiming "fair use" as a defense; hence, an educational broadcaster sued for infringement would be obliged to supply proof concerning certain enumerated factors, the relevant data of which is in the possession of the copyright owner (plaintiff).

C. Section 20

This provision, which radically changes the present duration of copyright by adopting a basic period measured by the life of the author plus fifty years, would:

1. Curtail education's access to copyrighted materials by extending the period before which copyrighted works go into public domain.
2. Lengthen the term of copyright to an extent which experience indicates is neither necessary or advisable for all works.

    a. Under present law providing an initial 28 year period, 85% of the copyrighted materials are not renewed.
    b. The new Bill would mean that this 85% non-renewed copyrighted material (which would otherwise go into the public domain from the 29th year) could remain protected for a hundred years or more - often needlessly.

3. Create a highly complex system of variable and multiple durations that would make it difficult to ascertain what copyrighted material is in the public domain, e.g., when or whether the copyright proprietor died.

V. BASIC POSITION OF THE AD HOC COMMITTEE ON THE BILL

A. The Ad Hoc Committee believes that the present copyright law should be revised and up-dated because it is outmoded.

B. The Ad Hoc Committee is unalterably opposed to any revision which would deprive education of existing rights under the present law and which would fail to protect and advance the vital rights of education under the copyright statute. For this reason, the Ad Hoc Committee on Copyright Law Revision is unalterably opposed to the enactment of H.R.11947 and S.3008 (especially sections 5 and 8) in their present form.

C. Therefore, unless H.R.11947 and S.3008 are substantially amended to provide necessary and suitable protection for education's rights in the public interest, the Ad Hoc Committee will vigorously oppose enactment of these bills and will make all possible efforts to urge retention of the present law which provides time-tested (albeit inadequate) Congressional recognition for non-profit educational uses of copyrighted materials.

VI. SOME OF EDUCATION'S CONTENTIONS IN COPYRIGHT LAW REVISION

A. Education represents the major public interest and highest public concern of the nation. The primary objective of conferring copyright, according to the Supreme Court, is "for the public benefit." The public interest is served by maximum encouragement of the "creators" in our society together with maximum availability of the fruits of their labors.

B. Education's needs require the maximum degree of accessibility to copyrighted materials with minimum restrictions under law.

1. Historically, education has always been accorded exemptions in laws dealing with land grants, taxes, postal rates, distribution of surplus property, etc.
2. Recently Congress passed laws for the special fostering of educational television.
3. The FCC has recognized the special nature of education's needs by reserving for education's exclusive use portions of the FM and TV spectra.

C. Education is not a business and should not be lumped with profit-making enterprises.

1. Imposing commercial standards and restrictions upon educational use of copyrighted materials would greatly hinder their use by education and severely handicap the educational process.
2. Non-profit use of copyrighted materials by an educational user for a recognized educational purpose is not injurious to the copyright owner in the market place, but, on the contrary, often promotes sales of such materials. This proposed law would:

   a. restrict rather than expand the use of copyrighted materials,
   b. diminish rather than enlarge the provocative exposure of works of art.
   c. foster a short-term financial gain for copyright owners at the cost of arresting the development of modern educational technique and impede the creation and promotion of a future market for meritorious works.

D. Education is education - whether over a microphone, or camera, or in a face-to-face teaching situation. To separate educational broadcasting from education is wholly incompatible with the realities of modern life.

E. At a time when education is facing its greatest challenge, it is manifestly contrary to the public interest to burden it with handicaps which would restrict its full utilization of modern technology to increase and improve educational productivity.

F. At a time when the Government is calling upon education as never before in history to train the young and re-train the adults in our society, it is absurd to have a particular branch recommend legislation to Congress which would impose a crushing handicap upon the whole educational process.

VII. AD HOC COMMITTEE'S SPECIFIC AMENDMENTS TO THE PROPOSED BILL

Consonant with its previous recommendations, the Ad Hoc Committee recommends that:

A. the proposed Section 8 of H.R.11947 and S.3008 be renumbered as Section 8(a), by inserting "(a)" prior to "Notwithstanding" on line 22 of page 6;

B. subparagraphs (1) and (2) of Section 8 be deleted entirely, and the remaining subparagraphs be renumbered accordingly; and that

C. the following new subparagraph "(b)" be added to Section 8:

"(b) Notwithstanding the provisions of Section 5, recognized non-profit educational institutions or organizations may use for non-commercial educational purposes:

(1) non-dramatic opyrighted works, provided that no more than a single copy or recording of such copyrighted works is made in the course of such use;

(2) dramatic copyrighted works if no special admission fee is charged to the audience, provided that no more than a single copy or recording of such copyrighted works is made in the course of such use and then only where the performers are limited to students, faculty, or staff;

(3) excerpts or quotations from copyrighted works if such uses are for illustrative, critical or ancillary educational purposes, provided that such excerpts or quotations are identified as to source;

where no such copyrighted material is sold or leased for profit, no commercial advertising is included, nor other private gain is involved.

For the purposes of this section, "Non-dramatic[2] copyrighted works" shall include works in the categories listed in Section 1 (1), (2), (5), and (7) of this Act, and "dramatic copyrighted works" shall include works listed in the categories in Section 1 (3), (4), and (6) of this Act."

D. Since the data relevant to proof of infringement is peculiarly in the hands of the copyright owner, the burden of proof should properly be placed on him by an added provision in Section 6 as follows:

"Provided that non-commercial use by a non-profit educational institution or organization for non-profit educational purposes shall be presumed to be such 'fair use' unless the contrary be proved."

E. Retention of the duration of present copyright provision, a 28 year initial period plus a 28-year renewal period. As an alternative, support for the Register's own proposal in his 1961 Report to the Congress: a 76-year total term, comprised of an initial 28-year term plus a 48-year renewal term.

VII. WHAT'S AHEAD ON COPYRIGHT?

A. The Register will submit a revised Bill for introduction early in the next session of Congress (possibly in January). It will then be scheduled for hearings before the judiciary committees of the House and Senate or their subcommittees (possibly in March). When such hearings are held, educational groups along with all interested parties will have the opportunity to file written statements or provide oral testimony.

B. When the hearings are complete, the Bills may be reported out with committee recommendations (possibly in May). The next step is to obtain a rule from the House Committee on Rules, which is necessary before the House version can be considered by that body. This might or might not be forthcoming during the first session. As a guess, it will be at least a year and a half before Congress gets around to considering a revision of the Copyright Law. The interim extension of the present law expires December 31, 1965.

C. In the meantime:

1. The Ad Hoc Committee will continue to hold meetings with other interested groups, examine and refine its position, and confer with the Register.

(2) Non-dramatic would include literary, musical, pictorial and sound recording works; dramatic would include dramatic, and choreographic works, pantomimes, and motion pictures.

2. NAEB will hold a general session on Copyright at the Austin Convention including representatives from the Copyright Office and book and music publishers.
3. Educational users - including radio and television stations, production centers, and closed-circuit systems - will examine the impact of the proposed law upon their present and planned operations and prepare documentation.
4. NAEB will continue to participate in the activities of the Ad Hoc Committee and keep its own membership fully advised of developments.

D. In general, there are three stages in the legislative process during which there may be opportunity to have education's views on copyright considered:

1. The present period during which the Register is modifying his draft Bill preparatory to submitting the new version.
2. The Congressional hearings during which Committee members are making up their minds about whether or not to report out the Bill and, if so, in what form.
3. The period when the Bill comes to the floor of either house and during which Congressmen may offer amendments.

E. If education is unable to secure what it considers appropriate revisions in the law by the time the Bill comes to a final vote, it always has the prerogative of opposing the entire legislation and electing to live with the existing law.

IX. PERSONAL OBSERVATIONS

I am convinced that the Register is making a sincere effort to revise the Copyright Law, which all agree is outmoded, so as to achieve a law which will be fair and equitable. Mr. Kaminstein and his staff have spent nine years in research (including study of European copyright laws) and have held dozens of formal hearings and innumerable informal conferences. They have been receptive to the expressions of sentiment of all groups, agencies, organizations, and individuals having a stake in the application of copyright law. They have made a concientious effort to draw a bill which achieves a workable compromise between the conflicting interests in our society. This is a most difficult task, for the issues are complex, the pressures from all sides severe.

In my judgment, however, the proposed bill, largely because it removes the "for profit" provision without substituting anything equally or even approximately beneficial, constitutes an unwarranted withdrawal of rights now available to education; furthermore, it appears to be especially and intentionally discriminatory against educational broadcasting. Obviously the Register has been impressed by the concern of publishers who are apprehensive about the possibility of unrestricted copying and widespread distribution of television

programs which contain complete copyrighted works or major portions thereof. This, they fear, would destroy the market for such works and deprive the publisher of legitimate profit. The reflection of this concern is to be found in the removal of the not-for-profit exemption and the prohibition against recording of any kind - audio or video, open or closed circuit. Incidentally, lawyers are not agreed that educators have the right to record copyrighted material under existing law - except of minimal portions under certain circumstances. However, this "right" is commonly assumed and educational broadcasters have generally proceeded on the theory that they could record any material which they had a right to perform. The new law allows little room for such assumption; it makes it clear that the making of copies - even a single copy - without permission of the copyright owner is prohibited.

The concern of authors and composers that their works will be exploited by educational broadcasters by exposing them to millions of people (all educational broadcasting, radio or TV, tends to be equated with ETV Channel 13, New York) without payment of any kind, is reflected in the Bill by limiting educational exemptions in this area only to certain performances of copyrighted works via closed-circuit.

These and other provisions reveal a lack of understanding of the true nature of educational broadcasting - its diversity, operation, purpose, and differences from commercial broadcasting. These misconceptions must be corrected if educational broadcasting is to get more sympathetic attention and adequate benefits in the drafting of the new bill.

In the months ahead, educational broadcasters, I suggest, must hold to two resolutions: (1) to remain firmly welded to the Ad Hoc Committee so that all integral parts of education maintain a strong unified position and (2) to keep the avenues of communication open to all interested parties in order that we can gain an understanding of the views of others and at the same time promote their understanding of our concerns.

It is vital for educational broadcasters to realize that copyright law revision involves a great many considerations and that people representing the copyright owners are no less earnest and sincere than they in feeling that their positions represent the true public interest.

In the next of these memoranda, I will attempt to reflect the views of textbook publishers, authors, and music publishers on the proposed revision of the copyright law in order to provide NAEB people with an appropriate perspective on the total terrain. As broadcasters, and as a part of the educational constituency, we have certain principles we should uphold by all appropriate means; as citizens we are concerned with the overall welfare of our society. Accordingly, we must be zealous in encouraging proper recognition for education in copyright revision, but at the same time we must make a sincere effort to participate in a dialogue which attempts to synthesize or reconcile conflicting interests and views and from which can emerge a law which will truly promote the broad public interest.

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